

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)	
)	
The Development of Operational,)	
Technical and Spectrum Requirements)	
For Meeting Federal, State and Local)	WT Docket No. 96-86
Public Safety Agency Communication)	
Requirements Through the Year 2010)	
)	
Establishment of Rules and Requirements)	
For Priority Access Service)	

**MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION**

Adopted: April 26, 1999

Released: May 4, 1999

By the Commission:

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	0
II. BACKGROUND	0
III. DISCUSSION	0
A. ANSI Accreditation of Standards Developers	0
B. NCC Standards Development Involving Intellectual Property Licensing	0

IV. PROCEDURAL MATTERS.....	0
A. Regulatory Flexibility Act.....	0
B. Authority	0
C. Further Information	0
V. ORDERING CLAUSES.....	0

Appendix A –Supplemental Final Regulatory Flexibility Act Analysis

I. INTRODUCTION

1. On September 29, 1998, the Commission adopted a *First Report and Order and Third Notice of Proposed Rulemaking (First Report and Order)* in this docket establishing a band plan and adopting service rules in the newly-reallocated public safety spectrum at 764-776 MHz and 794-806 MHz ("the 700 MHz band").¹ Several parties, including the American National Standards Institute (ANSI), timely filed petitions for reconsideration and/or clarification of the *First Report and Order*.² ANSI's Petition for Reconsideration (ANSI Petition) raises three issues that should be resolved promptly in order to allow the recently formed National Coordination Committee (NCC) the timely benefit of the flexibility and improved procedures requested by ANSI and provided in this *Memorandum Opinion & Order (MO&O)*. The first issue relates to whether the NCC should itself be required to become ANSI-accredited, and whether the NCC should be allowed to make use of the work of other ANSI-accredited Standards Developers (ASDs).³ The second issue involves the requirement in the *First Report and Order* that license fees and terms of license agreements for proprietary technology in standards recommended by the NCC be approved by ANSI.⁴ The third issue is whether the NCC should employ the ANSI patent policy to protect standards users in their dealings with holders of proprietary rights that are

¹ See Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, FCC 98-191, Released September 29, 1998 (*First Report and Order*).

² Seventeen parties filed petitions for clarification and/or reconsideration in response to the *First Report and Order*. See Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2312, January 14, 1999. The issues raised in these petitions, to the extent not addressed here will be considered in a future Order.

³ See *First Report and Order* at para 92.

⁴ See *First Report and Order* at para 122.

contained in NCC-recommended standards. The Telecommunications Industry Association (TIA) has also filed a Petition for Reconsideration (TIA Petition) which supports and outlines ANSI's functions and concerns.⁵

2. In this *MO&O*, we respond to ANSI's petition by clarifying certain aspects of the *First Report and Order* relating to the NCC, and we modify our initial decision in three respects. First, in order to allow the NCC to make more efficient use of ANSI standards processes, we are expanding the standards development options available to the NCC by providing that the NCC may, but is not required to, become ANSI-accredited.⁶ In this regard, we also clarify that the NCC is allowed to make use of and base its recommendations on the standards development work of other existing ASDs. Second, we are rescinding the requirement that the fees and terms of license agreements involving proprietary technologies contained in NCC-recommended standards be approved by ANSI. Third, we are revising the process for allowing the incorporation of proprietary technologies into standards recommended by the NCC. We will require the owner or holder of the rights to such technologies to file a statement with the NCC indicating that they will make such rights available to applicants either without cost or without unfair discrimination.

3. As a result of our action in this *MO&O*, we have addressed the fundamental concerns raised by ANSI in its petition, thus allowing the work of the NCC to proceed in a timely fashion, with the flexibility to operate more efficiently, and without constraints that may have unnecessarily delayed the completion of that work. In addition, this *MO&O* provides new procedures that will promote competition in the market for public safety communications equipment by protecting users of standards recommended by the NCC from unfair discrimination in the licensing of proprietary technology.

⁵ See TIA Petition filed December 2, 1998. The TIA Petition outlines the functions of ANSI at 2-7.

⁶ TIA notes in its Petition at 8 that the Commission mistakenly used the term "certification" instead of the correct term for ANSI "accreditation." We hereby correct those references to read ANSI accreditation and delete references to ANSI certification.

II. BACKGROUND

4. This proceeding was initiated in 1996⁷ as part of the Commission's response to direction from Congress to develop a framework to ensure that public safety communications needs are met through the year 2010.⁸ In the Balanced Budget Act of 1997, Congress directed the Commission to reallocate 24 megahertz of spectrum recovered from TV Channels 60-69 as a result of the digital television (DTV) proceeding for public safety services.⁹ In 1998, the Commission adopted a *Report and Order* reallocating 24 megahertz of spectrum located in the 764-776/794-806 MHz bands (700 MHz band) for public safety services.¹⁰ At the same time, the Commission released its *Second Notice of Proposed Rulemaking* in this proceeding which sought comment on how best to use this 24 megahertz of spectrum.¹¹ The record developed after the *Second Notice* led to the adoption of the band plan and service rules contained in the *First Report and Order*.¹² Part of the band plan called for 2.6 MHz, or 10.8 percent of the band, to be devoted to nationwide public safety interoperability use.¹³

5. In the *First Report and Order*, the Commission stated that the comments filed in response to the *Second Notice* in this proceeding "strongly support the need for national planning" for both the spectrum in the 700 MHz band designated for interoperability purposes and the spectrum designated for general use.¹⁴ Accordingly, the Commission stated that it would

⁷ See Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Notice of Proposed Rule Making*, 11 FCC Rcd 12,460 (1997) (*First Notice*).

⁸ See 47 U.S.C. § 309(j)(10)(B)(iv), as added by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 312 (1993).

⁹ See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3004, 111 Stat. 251 (1997). See also Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 10,968 (1996).

¹⁰ See Reallocation of Television Channels 60-69, the 746-806 MHz Band, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22,953 (1997) (*Reallocation Report and Order*).

¹¹ See Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010; Establishment of Rules and Requirements of Priority Access Service, WT Docket No. 96-86, *Second Notice of Proposed Rule Making*, 12 FCC Rcd 17,706 (1997) (*Second Notice*).

¹² For a complete history and background of this proceeding, see *First Report and Order* at paras. 13-16.

¹³ See *First Report and Order* at para. 20.

¹⁴ See *First Report and Order* at para 90.

seek to charter an advisory committee designated as the National Coordination Committee (NCC) for the purpose of addressing and advising the Commission on certain public safety communications matters, and that it would do so in accordance with the procedural steps contained in the Federal Advisory Committee Act (FACA).¹⁵ The *First Report and Order* described the major responsibilities of the NCC as follows: (1) formulate and submit for Commission review and approval an operational plan to achieve national interoperability that includes a shared or priority system among users of the interoperability spectrum, for both day-to-day and emergency operations, and recommendations regarding Federal users' access to the interoperability spectrum; (2) recommend interoperability digital modulation, trunking, and receiver standards for Commission review and approval; (3) provide voluntary assistance in the development of coordinated regional plans; and (4) provide general recommendations to the Commission on operational plans of the public safety community.¹⁶

6. In connection with the NCC's responsibility to develop recommendations for technical standards to be employed in public safety interoperability spectrum, the *First Report and Order* required that the NCC's charter would "specify that it or a working group established thereunder" was to be accredited by the ANSI to develop all technical standards.¹⁷ The *First Report and Order* emphasized that the standards recommended by the NCC for digital modulation, trunking, and receivers must be developed in accordance with ANSI-accredited procedures.¹⁸

7. The *First Report and Order* also provided that with regard to all technical standards recommended by the NCC, "no proprietary data is to be incorporated in any standard ultimately recommended unless the proprietary data is made available on a fair, reasonable, unbiased and non-discriminatory basis, with license fees approved by ANSI and on terms and conditions set by that standards body."¹⁹ The *First Report and Order* further provided that the NCC was expected to complete its work within four years of the release date of the *First Report and Order*.²⁰

¹⁵ See *First Report and Order* at para 92. See also Federal Advisory Committee Act, 5 U.S.C., App. 2 (1988).

¹⁶ See *First Report and Order* at para 92.

¹⁷ See *First Report and Order* at para 92. ANSI is a private, nonprofit membership organization supported by a diverse constituency of private and public sector organizations. See, e.g., An Introduction to ANSI (<<http://web.ansi.org/public/about.html>>). ANSI does not itself develop American National Standards (ANSs); rather, it facilitates their development by establishing guidelines to ensure consensus, due process, and openness. *Id.* ANSI has three methods of accreditation (organization, committee or canvass). See generally ANSI Procedures for the Development and Coordination of American National Standards (approved by the ANSI Board of Directors, April 1998).

¹⁸ See *First Report and Order* at paras. 92, 105, 117, and 122.

¹⁹ See *First Report and Order* at para. 122.

²⁰ See *First Report and Order* at para 122.

III. DISCUSSION

A. ANSI Accreditation of Standards Developers

8. In its Petition for Reconsideration, ANSI describes itself as a private sector organization that, among other things, serves as the policy forum for the U.S. standards and conformity assessment communities, accredits domestic standards developers, approves standards as American National Standards, and safeguards the integrity and value of the American National Standard designation by requiring due process, balance of interests, consensus and openness to all directly and materially affected interests in the private and public sectors.²¹ ANSI and TIA describe in some detail the procedures required in the development and approval of American National Standards, and in the accreditation of Standards Development Organizations, Standards Committees and Canvass Developers.²²

9. ANSI states from its experience that development and approval of an individual standard as an American National Standard can take from six months to three years.²³ Additionally, an application for accreditation of a Standards Development Organization or Standards Committee can take between four and fifteen months, or much longer if the application generates opposition on public review.²⁴

10. ANSI argues that because the NCC is required to complete its work within four years, "it is possible that the procedures preparation interval and accreditation interval could significantly use up a major portion of the four-year interval leaving insufficient time for the actual technical standards work."²⁵ Consequently, ANSI states that although the Commission can allow the NCC to become accredited itself if the NCC determines that such action is required, the Commission should also allow the NCC to make use of the work of any Accredited Standards Developer that has the requisite expertise in public safety telecommunications. ANSI identifies one such accredited entity as the Engineering Committee TR-8 of the TIA.²⁶ TIA strongly recommends that the Commission modify the language to specify that the NCC or a

²¹ See ANSI Petition filed December 2, 1998 at 2.

²² In general, see ANSI Petition at 4,5 and 7-9. See also TIA Petition at 2-7 and Exhibits A-D.

²³ See ANSI Petition at 4. See also Motorola Petition for Reconsideration and Clarification at 8.

²⁴ See ANSI Petition at 8.

²⁵ See ANSI Petition at 9.

²⁶ See ANSI Petition at 9.

related Working Group become ANSI-accredited, or that the NCC rely on an already-accredited ANSI standards developer who has expertise in this area of telecommunications work.²⁷

11. We conclude that ANSI and TIA have made a strong case for increasing the number of options available to the NCC for developing the standards it is required to recommend under the provisions of the *First Report and Order*. We agree that allowing the NCC to make use of the work of other ASDs would offer the benefits of increased efficiency and improved use of NCC resources. The NCC could take advantage of these options in several ways, including by reviewing and recommending existing American National Standards, by working with one or more ASDs to advance the progress of pending documents toward their approval as American National Standards, or by entering into an agreement with one or more ASDs to begin the process of developing one or more new standards.²⁸ The ability to employ one or more of these approaches would potentially save time by allowing the NCC to build on standards work already accomplished or by allowing other technical standards development work to begin immediately, under ANSI procedures, without the necessity of waiting for the potentially lengthy process of accreditation of the NCC itself. In addition, allowing the NCC to work cooperatively with existing ASDs with expertise in the area of public safety communications would have the effect of conserving the committee's limited resources and could also help avoid challenges to the accreditation of the NCC on the ground of duplication or overlap of jurisdictions.²⁹ Finally, because American National Standards must be reaffirmed or withdrawn every five years, cooperative efforts with an existing ASD, such as TIA's Engineering Committee TR-8, would provide the capability of maintaining the standards developed through this process after the NCC ceases functioning four years hence.³⁰

12. We note that by expanding the options available to the NCC in this way, we adhere to the original intent of the *First Report and Order* by maintaining the requirement that any standard recommended to the Commission by the NCC must be developed under an "open process, governed by ANSI or standards approved by ANSI."³¹ We further note that this modification is supported by the commenters,³² and other petitioners asking for reconsideration.³³

²⁷ See TIA Petition at 11.

²⁸ See ANSI Petition at 9,10.

²⁹ See ANSI Petition at 8.

³⁰ See ANSI Petition at 9,10.

³¹ See *First Report and Order* at para. 122.

³² See, e.g., FLEWUG comments at 17 (supporting the choice of an open standard created by an ANSI accredited entity).

³³ See FLEWUG Petition for Reconsideration and Clarification at 19,20; Petition of APCO for Reconsideration

Of course, should the NCC conclude that no existing ASD can adequately develop the needed standards, the NCC retains the option of seeking ANSI accreditation as a standards developer for itself or an NCC subcommittee or working group.

13. Accordingly, for the reasons stated above, we modify the provisions of the *First Report and Order* to provide that the NCC may, in its own discretion, seek to become or to have a subcommittee of the NCC become an ASD under ANSI procedures. The NCC is not required to do so to the extent that it is able to support adequately its technical standards recommendations with standards developed and approved under ANSI procedures by one or more existing ASDs.

B. NCC Standards Development Involving Intellectual Property Licensing

14. The *First Report and Order* describes a role for ANSI in approving license fees and setting terms and conditions for such fees when sought by owners of propriety data used in a standard recommended by the NCC. In its Petition for Reconsideration, ANSI asserts that it cannot undertake this role because it lacks the necessary expertise and because such an unaccustomed role for ANSI would not meet with the approval of the voluntary standards community.³⁴ TIA echoes ANSI's concerns in its Petition for Reconsideration.³⁵

15. ANSI suggests that the Commission adopt, in preference to the active role for ANSI suggested in the *First Report and Order*, the patent policy used by ANSI and similarly by international standards organizations.³⁶ ANSI asserts that this policy is self-policing and has proved effective in achieving acceptable licensing terms and conditions for patented technology used in ANSI standards.³⁷ TIA confirms that this policy is self-policing and very similar to the policy followed at the International Telecommunication Union.³⁸

16. Under the ANSI patent policy, an American National Standard may include patented technology if technical reasons justify that approach.³⁹ Before such a standard will be approved,

and Clarification at 13; and Motorola Petition for Reconsideration and Clarification at 8,9.

³⁴ See ANSI Petition at 10.

³⁵ See TIA Petition at 12.

³⁶ See ANSI Petition at 10-12.

³⁷ See ANSI Petition at 11.

³⁸ See TIA Petition at 13-14.

³⁹ See ANSI Petition at 11.

however, ANSI must receive from the patent holder a statement that the patent holder either will (a) make its technology available to applicants without compensation, or (b) license its technology to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.⁴⁰ In its pleading, TIA notes that the patent holder must provide the statement to TIA who in turn forwards it to ANSI.⁴¹ The statements received by ANSI are kept on file and beneficiaries of the statements can seek their enforcement in the courts or otherwise outside of ANSI's procedures.⁴² In addition, ANSI notes that a patent holder that fails to abide by the representations contained in its filed statement risks having the standard withdrawn or not published and, in the case of deliberate misconduct, further risks the intervention of the Federal Trade Commission.⁴³

17. ANSI asserts that this policy is pro-competitive in that it seeks to balance the rights of patent holders to exploit their government-granted monopoly against the rights of the users of the standard, and it requires patent holders to license their technology to all parties, including competitors, on non-discriminatory terms.⁴⁴ ANSI also states that this policy seeks to allow the patent holder the rights to the market power granted by the patent without allowing an unfair additional advantage as a result of the incorporation of that technology into a consensus standard.⁴⁵ This position is supported by TIA.⁴⁶

18. On reconsideration, we agree that ANSI is not an appropriate entity to approve proprietary technology license terms and fees involved with standards recommended by the NCC. Accordingly, we rescind the requirement in the *First Report and Order* that license fees or terms in license agreements for proprietary technology contained in any NCC-recommended standard be approved by ANSI. We further conclude, based upon the recommendation of both ANSI and TIA, that the alternative of a self-policing policy such as the ANSI patent policy can be structured to protect adequately the rights of both intellectual property right holders and consensus standard users while at the same time encouraging competition.

⁴⁰ See American National Standards Institute, "Procedures for the Development and Coordination of American National Standards, §§ 1.2.11.1-4, April, 1998.

⁴¹ See TIA Petition at 13.

⁴² See ANSI Petition at 11.

⁴³ See ANSI Petition at 12.

⁴⁴ See ANSI Petition at 11.

⁴⁵ See ANSI Petition at 11.

⁴⁶ See TIA Petition at 13.

19. The ANSI patent policy, however, may be insufficient to protect all of the parties potentially affected in cases where proprietary intellectual property rights are asserted over technology imbedded in a standard recommended by the NCC. We conclude that these rights should be addressed by any policy that seeks to prevent abuses in the licensing of proprietary rights in consensus standards recommended by the NCC. Because there are intellectual property rights other than patent rights that may be asserted over such technology, such as rights granted by copyright, these may become the subject of licensing agreements.

20. Accordingly, we are modifying the language in the subsection of paragraph 122 of the *First Report and Order* relating to proprietary data. Within paragraph 122, the subparagraph beginning "no proprietary data" and ending "set by that standards body" is deleted and replaced with the following language: "proprietary technology may be incorporated in a standard ultimately recommended when the NCC concludes that technical reasons justify its incorporation, however, no intellectual property subject to a licensable proprietary right granted by patent or copyright, where the owner or holder of the right has licensed or expressed an intention to license the technology, may be included in a standard ultimately recommended unless the owner or holder of the right files a statement with the NCC prior to such recommendation which states that the owner or holder will either (a) make its technology available to applicants without compensation, or (b) license its technology to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.⁴⁷ For purposes of this paragraph, the term "applicant" means a person or entity seeking to utilize the license for the purpose of implementing the standard.

21. We conclude that this approach, like that suggested by ANSI and TIA, is likewise consistent with the terms of the National Technology Transfer and Advancement Act (NTTAA) and Office of Management and Budget (OMB) Circular A-119, 63 Fed. Reg. 8545 (February 18, 1998), Sections 4a and 6j, which recommend that federal agencies participate in and support the voluntary standards process and that patents essential to a standard be licensed on terms that are reasonable and non-discriminatory.⁴⁸

⁴⁷ This process is separate from ANSI's requirements. We do not intend to deter a patent holder from also filing with ANSI.

⁴⁸ See ANSI Petition at 12. See also TIA Petition at 14-15.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

22. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (1981) (RFA), the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (SFRFA) of the expected impact on small entities by the policies and rules adopted in this Order. The SFRFA is contained in Appendix A.

B. Authority

23. This action is taken pursuant to Sections 1, 4(i), 4(j), 201, 202, 303(r), 309, 332, and 403 of the Communications Act, 47 U.S.C. §§ 1, 4(i), 4(j), 201, 202, 303(r), 309, 332, 403.

C. Further Information

24. For further information regarding this Order, contact Michael Pollak, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, at (202) 418-0680.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the American National Standards Institute and the Telecommunications Industry Association ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

26. IT IS FURTHER ORDERED that the Office of Public Affairs, Reference Operations Division, shall send a copy of this Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix A of the *First Report and Order* issued in this proceeding.⁴⁹ The Commission's Supplemental Final Regulatory Flexibility Analysis (SFRFA) in this Memorandum Opinion and Order on Reconsideration (*Order on Reconsideration*) contains information additional to that contained in the FRFA and is thus limited to matters raised on reconsideration with regard to the *First Report and Order* and addressed in this *Order on Reconsideration*. This SFRFA conforms to the RFA, as amended by the Contract with America Advancement Act of 1996.⁵⁰

I. Need for and Purpose of This Action

2. In the *Order on Reconsideration*, the Commission responds to the Petition for Reconsideration filed in connection with the *First Report and Order* in this docket by the American National Standards Institute (ANSI and ANSI Petition). The Commission clarifies certain aspects of the *First Report and Order* relating to the operation of the National Coordination Committee (NCC). The NCC was established as provided in the *First Report and*

⁴⁹ See Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, FCC 98-191, Released September 29, 1998, at Appendix A (herein *First Report and Order*). As required by § 603 of the RFA, an Initial Regulatory Flexibility Analysis (IFRA) was incorporated in the initial *Notice of Proposed Rulemaking* in WT Docket No. 96-86. See Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Notice of Proposed Rulemaking*, 11 FCC Rcd 12,460 (1996) (*First Notice*). The proposals in the *First Notice* were refined and modified in a *Second Notice of Proposed Rulemaking* in this docket, into which a second IFRA was incorporated. See Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Second Notice of Proposed Rulemaking*, 12 FCC Rcd 17,706 (1997) (*Second Notice*). The Commission sought written comment on the proposals in the *Second Notice* including the IFRA. The FRFA in the *First Report and Order* addressed issues raised by commenters that might affect small entities.

⁵⁰ Pub. L. No. 104-121, 110 Stat. 846 (1996) (CWAAA). Title II of the Contract with America Act is entitled "The Small Business Regulatory Enforcement Fairness Act of 1996" (SBREFA), and is codified at 5 U.S.C. §§ 601-611.

Order pursuant to the provisions of the Federal Advisory Committee Act (FACA) to develop and recommend to the Commission technical standards to be used in public safety interoperability spectrum across the country.

3. In response to the ANSI Petition, the Commission modifies its initial decision in three respects. First, in order to allow the NCC to make more efficient use of ANSI standards processes, the Commission expands the standards development options available to the NCC by providing that the NCC may, but is not required to, become ANSI-accredited. The Commission also clarifies that the NCC is allowed to make use of and base its recommendations on the standards development work of existing ANSI-Accredited Standards Developers (ASDs). Second, the Commission rescinds the requirement from the *First Report and Order* that the fees and terms of license agreements involving proprietary technologies contained in NCC-recommended standards be approved by ANSI. And third, the Commission revises the process for allowing the incorporation of proprietary technologies into standards recommended by the NCC by requiring the owner or holder of the rights to such technologies to file with the NCC a statement that they will make such rights available to applicants either without cost or without unfair discrimination.

4. As a result of the Commission's action in the *Order on Reconsideration*, it has addressed the fundamental concerns raised by ANSI in its petition, thus allowing the work of the NCC to proceed in a timely fashion, with the flexibility to operate with increased efficiency, and without the constraints that may have unnecessarily delayed the completion of that work. In addition, the *Order on Reconsideration* provides new procedures for the NCC that will promote competition in the market for public safety communications equipment by protecting users of standards recommended by the NCC from unfair discrimination in the licensing of proprietary technology contained in such standards.

II. Summary of Significant Issues Raised by the Public Comments in Response to the Final Regulatory Flexibility Analysis

5. No comments were filed in direct response to the FRFA.⁵¹ In the ANSI Petition, and in certain other pleadings, issues were raised that might affect small entities. Specifically, ANSI argued that it had no authority to approve the license terms and fees offered by owners or holders of rights to proprietary technology and that better protection of licensees of this technology could be offered by adoption of the ANSI patent policy. ANSI also asserted that the NCC should not be required to become an ASD to develop its own standards but instead should be able to make

⁵¹ In addition, no comments were filed in direct response to the IRFA. In comments responding to the *Second Notice*, however, some commenters raised issues that might affect small entities. Those comments that are relevant to this *Order on Reconsideration* are addressed herein. The others will be addressed in later orders in this proceeding.

use of American National Standards, or preliminary or in-process standards developed by other ASDs. FLEWUG supported the concept of requiring that the NCC choose an open standard created by an ANSI-accredited entity.⁵²

III. Changes Made to the Proposed and Final Rules

6. In the *Second NPRM* the Commission proposed to set technical standards for public safety interoperability spectrum. In the *First Report and Order*, the Commission determined instead, to seek to create the NCC to advise the Commission on the standards to be used in such spectrum. The *First Report and Order* required the NCC to become an ASD in order to develop itself the standards that it would recommend to the Commission. This *Order on Reconsideration* rescinds that requirement and allows the NCC to make use of, and base its recommendations on, the work of other ASDs.

7. In addition, the *Order on Reconsideration* eliminates the requirement that fees and license terms for proprietary technology contained in any NCC-recommended standard be approved by ANSI. Instead, the Commission requires that before the NCC recommends any standard containing proprietary technology, where the technology is the subject of an actual or proposed license agreement, the owner or holder of such proprietary right must file with the NCC a statement that they will make such rights available to applicants either without cost or without unfair discrimination.

IV. Description and Number of Small Entities Affected by Rule Amendment

8. The changes in the operations of the NCC provided in this *Order on Reconsideration* would principally affect the NCC, ANSI, the public safety and commercial entities who contribute members and/or resources to the NCC, and the persons or entities that hold the rights to proprietary technology that might be included in an NCC-recommended standard. The public safety equipment manufacturers who might enter into agreements to use such standards in the construction of public safety communications equipment and the government and non-government entities that will purchase such equipment are only indirectly affected by the *Order on Reconsideration*.

⁵² See FLEWUG comments to the *Second Notice* at 17.

9. The Commission released a Public Notice soliciting nominations for membership.⁵³ Membership is open to any interested member of the public safety communications community, including representatives of federal, state and local government entity radio users, licensees and organizations, manufacturers, consulting firms, frequency coordinators and trade associations. A similar open membership structure was adopted for the most recent FCC-appointed federal advisory committee for public safety matters. This committee, formed in 1996 and called the Public Safety Wireless Advisory Committee (PSWAC), attracted approximately 500 members. It is anticipated that the NCC will have a similar number of members.

10. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁵⁵ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵⁶ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁵⁷ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁵⁸ ANSI has fewer than 300 employees, is independently owned and operated and we conclude that it is a small organization. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."⁵⁹ As of 1992, there were approximately 85,006 such jurisdictions in the United States.⁶⁰ This number includes 38,978 counties, cities, and towns; of

⁵³ See Public Notice, Public Safety National Coordination committee (rel. Jan. 29, 1999).

⁵⁴ See 5 U.S.C. § 601(6).

⁵⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

⁵⁶ Small Business Act, 15 U.S.C. § 632 (1996).

⁵⁷ 5 U.S.C. § 601(4).

⁵⁸ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁵⁹ 5 U.S.C. § 601(5).

⁶⁰ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

these, 37,566, or 96 percent, have populations of fewer than 50,000.⁶¹ The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

11. As a general matter, Public Safety Radio Pool licensees include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.⁶² Spectrum in the 700 MHz band for public safety services is governed by 47 U.S.C. § 337. Non-Federal governmental entities as well as private businesses are licensees for these services.

12. We anticipate that at least six radio equipment manufacturers might be affected by our decision in this *Order on Reconsideration*. According to the SBA's regulations, a communications equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.⁶³ Census Bureau data indicate that there are 858 U.S. firms that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.⁶⁴ We do not have information that indicates how many of the six radio equipment manufacturers associated with this proceeding are among these 778 firms. However, Motorola and Ericsson, firms that control approximately ninety-five percent of the public safety communications equipment market, are major, nationwide radio equipment manufacturers, and, thus, we conclude that these manufacturers would not qualify as small businesses.

⁶¹ *Id.*

⁶² See Subparts A and B of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.1 - 90.22. Police licensees include 26,608 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). Fire licensees include 22,677 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. Public Safety Radio Pool licensees also include 40,512 licensees that are state, county, or municipal entities that use radio for official purposes. There are also 7,325 forestry service licensees comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The 9,480 state and local governments are highway maintenance licensees that provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. Emergency medical licensees (1,460) use these channels for emergency medical service communications related to the delivery of emergency medical treatment. Another 19,478 licensees include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities.

⁶³ 13 C.F.R. § 121.201, (SIC) Code 3663.

⁶⁴ U.S. Dept. of Commerce, *1992 Census of Transportation, Communications and Utilities* (issued May 1995), SIC category 3663.

V. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements

13. The compliance requirements pertaining to the issues addressed in the *Order on Reconsideration* that were adopted in the *First Report and Order* include the provision that the NCC was to become accredited by ANSI as an ASD. Further, the *First Report and Order* required that no proprietary data was to be incorporated in any standard ultimately recommended by the NCC unless the proprietary data was made available on a fair, reasonable, unbiased and non-discriminatory basis, with license fees approved by ANSI and on terms and conditions set by that standards body. The *Order on Reconsideration* eliminates the requirement that the NCC become NCC accredited and the requirement that license fees terms and conditions be approved by ANSI. The *Order on Reconsideration* requires that before any standard may the owner or holder of the any rights to proprietary technologies that are incorporated into standards recommended by the NCC, where such owner or holder has licensed or announced and intention to license such proprietary technology, to file with the NCC a statement that they will make such rights available to applicants either without cost or without unfair discrimination.

VI. Steps Taken To Minimize the Economic Impact on Small Entities

14. The Commission has reduced the impact on small entities of the provisions governing the operations of the NCC by eliminating the requirement that the NCC become ANSI-certified as an ASD and by eliminating the requirement that all fees, terms and conditions of licenses for proprietary technology contained in any NCC-recommended standard be approved by ANSI. In addition, the Commission has adopted on reconsideration an alternative procedure to protect users of NCC-recommended standards from unfair discrimination. The requirement that owners or holders of rights to proprietary technology contained in NCC-recommended standards that seek to license such rights must file statements with the NCC will burden a handful of entities that may or may not be small entities. In contrast, the requirement will benefit thousands of small governmental jurisdictions and their agencies by protecting their suppliers from unfair discrimination in the acquisition of technologies, and by encouraging greater competition in the public safety communications equipment market.

VII. Significant Alternatives Considered and Rejected

15. The alternative approaches contained in the *First Report and Order* were considered and rejected as too burdensome, unnecessarily restrictive, or inefficient, thus leading the Commission to eliminate the above-described compliance requirements on ANSI and the NCC. With regard to a mechanism to protect users of NCC-recommended standards from unfair discrimination in the licensing of proprietary technology, the alternative of providing no protection was considered and deemed anti-competitive, unnecessarily expensive and

insufficiently responsive to the communications needs of the large and small members of public safety community that the Commission is bound by law to support. The chosen mechanism of requiring owners and holders of rights to proprietary technology to agree with their licensees to make the technologies available, either without cost or on terms that are free from unfair discrimination, and to evidence that agreement by filing a statement to that effect with the NCC, was determined to be the least expensive and burdensome alternative available. Moreover, given its probable effect of encouraging competition in the relevant equipment market, this mechanism was determined to generate the most favorable ratio of cost to benefit in the overall public safety communications community.

VIII. Report to Congress

16. The Commission shall send a copy of this Supplemental Final Regulatory Flexibility Analysis, along with the *Order on Reconsideration*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Supplemental Final Regulatory Flexibility Analysis will also be published in the Federal Register.